

MUNICIPALITY OF ANCHORAGE BOARD OF ADJUSTMENT
APPEAL FROM THE PLATTING BOARD'S PRELIMINARY PLAT APPROVAL FOR 18 MONTHS,
APPROVING THE SUBDIVISION OF THIRTY LOTS AND ONE TRACT OF LAND INTO THREE
TRACTS OF LAND WITH VACATION OF A PORTION OF A 40-FOOT ELECTRICAL
DISTRIBUTION LINE EASEMENT, FOR EAGLE BLUFF SUBDIVISION, TRACT C (PLAT NO. 98-
40), AND BLM LOTS 85-88, 90-94, 104-116, & 120-127: GENERALLY LOCATED WEST
OF YELLOWSTONE CIRCLE AND NORTH OF EAGLE RIVER LOOP ROAD, IN EAGLE RIVER

PLATTING BOARD CASE S-12031-2 RESOLUTION NO. 2014-006
BOARD OF ADJUSTMENT APPEAL NO. 2014-3

FINDINGS AND DECISION OF THE BOARD OF ADJUSTMENT

WHEREAS, an application for preliminary plat approval was filed with the Municipal Platting Board on December 2, 2013 on behalf of the Anchorage School District (ASD), petitioner, by Lounsbury and Associates, representative, for the subdivision of thirty lots and one tract of land into three tracts of lands with vacation of a portion of a 40-foot electrical distribution line easement, for Eagle Bluff Subdivision, Tract C (Plat 98-40), and BLM Lots 85-88, 90-94, 104-116, and 120-127; generally located west of Yellowstone Circle and north of Eagle River Loop Road, in Eagle River;

WHEREAS, the subject property is the site of Eagle River High School, which opened as a new school in 2005;

WHEREAS, after due notice and public hearing on February 5, 2014, the Municipal Platting Board approved the preliminary plat for 18 months subject to conditions as set out in Platting Board Resolution No. 2014-006, adopted by the Platting Board on April 2, 2014;

WHEREAS, LBJ, Limited Liability Company (Appellant LBJ) timely appealed the Platting Board's preliminary plat approval to the Board of Adjustment, for failure to address the subdivision agreement requirements in AMC Title 21, specifically with respect to upgrading Yosemite Drive to urban collector standards, arguing that the Platting Board's decision to approve the preliminary plat for 18 months was contrary to AMC Title 21 and unsupported by the evidence;

WHEREAS, the Board of Adjustment deliberated and decided the appeal on October 8, 2014;

NOW, THEREFORE, BE IT RESOLVED, the Board of Adjustment adopts the following findings and conclusions:

I.

FINDINGS OF THE BOARD OF ADJUSTMENT

1. The terms "Development Agreement" and "Subdivision Agreement" are not defined under AMC Title 21.
2. Terms and conditions of a "Subdivision Agreement" are delineated in Title 21, specifically in AMC 21.08.060.
3. Certain terms and conditions required for subdivision agreements by AMC 21.08.060 are absent in the Development Agreement dated March 22, 2013 (Exhibit C).
4. The Development Agreement dated March 22, 2013 (Exhibit C) is in force and effect, and shall be appended and incorporated by reference in the Platting Board Decision dated February 5, 2014, adopted by the Platting Board on April 2, 2014.
5. The Board of Adjustment takes official notice of 1) Exhibit A -- Platting Board June 1, 2005 Findings of Fact and Decision (included in the official record of the 2005 Board of Adjustment appeal of that decision, at pages 163 – 169) and 2) Exhibit B -- *Anchorage Board of Adjustment v. LBJ, LLC*, 228 P.3d 87 (Alaska 2010) for comparative analysis with the 2013 Development Agreement to clarify the record.
6. Standards a – h under Section 11 of the June 1, 2005 Platting Board Decision are restated in full in Section 1, Subsection A. of the March 22, 2013 Development Agreement.
7. The doctrine of collateral estoppel bars the Board of Adjustment from rehearing the issue of whether ASD falls within the definition of "subdivider" under AMC 21.75.035B. That ASD qualifies as a "subdivider" within the meaning of Title 21 is relied on in the affirmative in *Anchorage Board of Adjustment v. LBJ, LLC*, 228 P.3d 87, 93 (Alaska 2010), and the Board of Adjustment can identify no reasonable interpretation to exclude ASD as a governmental unit under the definition of "subdivider" under AMC 21.75.035.
8. The record does not support MOA's position that it cannot enter into a subdivision agreement with ASD; in fact, ASD is not synonymous with MOA.
9. The protections afforded under Title 21 include private enforcement actions, and the record does not support code construction to limit a Subdivision Agreement as being for the sole protection of the Municipality of Anchorage as a local government entity, to the exclusion of the public individually or collectively.

10. AMC Title 21 requires a subdivision agreement prior to final plat approval, and the Platting Board's decision should be modified to include this requirement.
11. In requiring the upgrade of Yosemite Drive to urban collector standards, the 2010 Supreme Court of Alaska Decision, *Anchorage Board of Adjustment v. LBJ, LLC*, did not mandate specific or exclusive use of a development agreement to accomplish the upgrade.

II. CONCLUSIONS

1. This appeal was heard in accordance with AMC 21.30.090.
2. The meeting at which the Board of Adjustment decided this appeal was held in accordance with AMC 21.30.080.
3. For purposes of clarification, the words "preliminary" and "preliminary plat" shall be added respectively to Findings of Fact No. 1 and No. 2 under subsection A, and in the preamble text of subsection B, of the Platting Board's Resolution No. 2014-006, adopted April 2, 2014, to read as follows:
 1. Approval of this preliminary plat is the most efficient process possible for getting the project completed.
 2. Testimony before the Platting Board by the Jose Vicente regarding the denuding of a vegetative buffer was not compelling enough to make changes to the conditions of preliminary plat approval

B. The Board APPROVES the above mentioned preliminary plat and vacation by a vote of 7 aye to 0 nay subject to the following conditions:
4. There shall be added to Platting Board's Resolution No. 2014-006, adopted April 2, 2014, the following paragraph:
 - C. Before approval or filing of the final plat, ASD shall enter into a subdivision agreement with the Municipality of Anchorage pursuant to AMC 21.08.060 for completion of ASD Project No. 865007 (*Yosemite Drive Upgrade*) as described under Section 1, Subsection A. of the Development Agreement, dated March 22, 2013, and PM&E Project No. 07-54 (*Yosemite Drive Drainage Improvement*) as described under Section 1, Subsection B. of the same Development Agreement, appended hereto and incorporated by this reference.

same Development Agreement, appended hereto and incorporated by this reference.

5. In all other respects, the decisions and findings of the Platting Board are affirmed.
6. This is a final decision of the Board of Adjustment with respect to all issues involved in this case. The parties have 30 days from the date of mailing or other distribution of this decision to file an appeal to the Superior Court.

PASSED AND APPROVED by the Board of Adjustment this 15th day of October, 2014.

A handwritten signature in blue ink, appearing to read "Bernd Guetschow", written over a horizontal line.

Bernd Guetschow, Chair
on his own behalf and on behalf of
Board of Adjustment Members
John Haxby and Robert Stewart

MUNICIPALITY OF ANCHORAGE PLATTING BOARD

FINDINGS OF FACT AND DECISION

S-11099-3 EAGLE RIVER AREA HIGH SCHOOL SUBDIVISION

WHEREAS, the Municipality of Anchorage/Anchorage School District sought to subdivide 26 lots and one tract into 3 different tracts with vacation of a BLM easement and section line easement along the east and south property boundaries, and with vacation of an electric distribution line easement, generally located on the east side of Yosemite Drive and north of Eagle River Loop Road, Eagle River, Alaska, and

WHEREAS, the Platting Board held a public hearing on June 18, 2003, considered the information and testimony presented both written and oral, closed the public hearing, and approved the preliminary plat and approved the vacation of an electric distribution line within the property boundary and postponed request to vacate the BLM and section line easements along the east and south property boundaries until July 16, 2003, and

WHEREAS the request to vacate the 50-foot BLM easement and the 33-foot section line easement was postponed again to September 3, 2004, and

WHEREAS, the petitioner formally withdrew the petition to vacate the 50-foot BLM and 33-foot section line easements along both the east and south property lines prior to the September 3, 2003 public hearing by letter dated August 7, 2003, and

WHEREAS, the preliminary plat was subject to eight (8) conditions which included:

Condition G that stated: "Submit a final Traffic Impact analysis approved by the Municipal Traffic Department and the State Department of Transportation prior to recording a final plat. All conditions of the approved Traffic Impact Analysis are incorporated into this preliminary plat approval by reference.

Condition H that states: "Enter into a subdivision agreement with the Private Development Section for construction of any road improvements that may be required by the final approved Traffic Impact Analysis.", and

WHEREAS, the final Traffic Impact Analysis (TIA) was completed February 3, 2004 and the approved TIA did not require any upgrade to Yosemite Drive, and

WHEREAS, an appeal was filed with the Municipal Clerk's Office on March 3, 2004, and

WHEREAS, the Board of Adjustment (BOA) declined to hear the appeal finding that the appeal was not filed in a timely manner as it was more than 15 days after the June 18, 2003 decision by the Platting Board, and

WHEREAS, on November 3, 2004, Mr. Jose Vicente and his representative, Ms. Sandra Wicks appeared before the Platting Board to request that the Board re-address the issue of improvements to Yosemite Drive to collector standards that will provide access to the new high school and that serves the Eagle Pointe Subdivision to the east of the new high school site, and

WHEREAS, on November 3, 2004, the Platting Board requested staff to provide information on the procedure by which the Board could consider re-opening the public hearing, and

WHEREAS, the matter was scheduled for the December 1, 2004 Platting Board meeting, but due to a short board and conflicts of interest the Board was not able to address the issue and the matter was postponed to the January 5, 2005 Platting Board meeting, and

WHEREAS, on January 5, 2005, the Platting Board approved a motion to re-open the public hearing for Case S-11099-3 finding that new evidence and changed circumstances did exist and finding that the petitioner did act in as diligent a manner as possible and that the re-opened public hearing be scheduled for March 2, 2005 and that discussions be limited only to the upgrade of Yosemite Drive, and

WHEREAS, the Platting Board held a public hearing on April 6, 2005 to review a 18-month time extension request for the preliminary plat that had been scheduled for a non-public hearing review for April 6, 2005 and to review improvements to Yosemite Drive, and

WHEREAS, the Platting Board approved a motion amend their agenda to review the 18-month time extension request during the public hearing to review the issue of improvements to Yosemite Drive, and

WHEREAS the Platting Board considered the information and testimony presented both written and oral, closed the public hearing, and approved an 18-month time extension subject to amended conditions of approval, and

WHEREAS, Board Member Linnell submitted a Notice of Reconsideration of the case to the Planning Department on April 7, 2005, and

WHEREAS, the Notice of Reconsideration was placed on the agenda for April 20, 2005 Platting Board meeting to be addressed as a Special Order of Business, and

WHEREAS, upon approval of a motion to reconsider the case, the Platting Board postponed action on the reconsideration to May 4, 2005 to allow all interested parties to be present for discussion of the motion to reconsider the motion that was approved on April 6, 2005, and

WHEREAS, on May 4, 2005 the Platting Board held a non-public hearing reconsideration of the case to discuss a motion to amend Condition 11 to state "Enter into a development agreement for improvement of Yosemite Drive from Eagle River Road to Eagle Pointe Subdivision to urban collector road standards", and

WHEREAS, the Platting Board is required to ensure the subdivision application meets the requirements of AMC 21.75.010, and

NOW, THEREFORE, BE IT RESOLVED that the Platting Board adopts the following findings and conclusions.

FINDINGS:

1. The Board found that the public hearing held on April 6, 2005 was conducted in accordance with its established and codified rules and procedures.
2. The Board did not re-open the public hearing on May 4, 2005 to discuss the motion to amend Condition 11 that would have substituted "urban collector standards" for the design standards that were included in Condition 11 items a through h that was approved on April 6, 2005 which specified the standards for improvement of Yosemite Drive from Eagle River Loop Road to Eagle Pointe Subdivision.

3. The Board found that the upgrade of Yosemite Drive is critical as there is a life safety issue with respect to the students on a narrow street and children walking along the side of the road without a sidewalk when there is snow on the ground.
4. The Board found that there is no dispute that Yosemite Drive is a collector road following the amendment to the Official Streets and Highways Plan (OS&HP) that changed the classification of Yosemite Drive to a collector street.
5. The Board found that the Municipality must be held to the same standards as any other entity working within the Municipality.
6. The Board found that it is in the best interest of the community to keep the school opening on schedule and this motion allows additional time for a funding mechanism to be developed for the improvements to Yosemite Drive.
7. The Board encouraged the Anchorage School District (ASD) to consider traffic mitigation measures such as limiting the number of student vehicles and encouraging carpooling, etc. to manage traffic impacts.
8. The Board clarified through questions to staff that the road improvement standards contained in Condition 11 items a through h were the same standards as those contained in the Design Criteria Manual and that urban collector standards would be applied to the road improvements required for the upgrade of Yosemite Drive.
9. The Board found that Items a through h of Condition 11 were, in fact, collector standards and therefore, the language of the condition should stand as approved on April 6, 2005.
10. Following testimony from the Municipal Engineer, the motion to amend Condition 11 items a through h failed by a vote of three (3) in favor, two (2) opposed with two (2) abstentions.
11. In dissenting opinion, Vice Chair Walsh found that the conditions that were imposed on the plat would ensure that the street is improved adequately, but that urban collector standards would do the same and that the Board would be setting a precedent by approving specific standards submitted by petitioners and that it

was more appropriate for the Board to apply the standards that are normally required by code for a preliminary plat.

12. In dissenting opinion, Board Member Linnell found that the motion to amend Condition 11 to substitute "urban collector standards" for the improvement of Yosemite Drive was proposed in the original motion that was made on April 6, 2005 and that the condition was then amended to include specific design criteria. Board Member Linnell found that that, in keeping to the requirements the Board typically imposes, the condition should simply refer to a road standard that is required by subdivision regulations.

At the conclusion of the May 4, 2005 Platting Board meeting, the Board made no changes to the conditions of approval that were approved at the conclusion of the public hearing on April 6, 2005 and amended as follows (amendments noted in **bold**):

1. Resolve utility easements and provide letters of non-objection for vacation of the electric distribution line easement.
2. Resolve the need with AWWU to enter into mainline extension agreements for the provision of public water and sanitary sewer service to the site prior to recording a final plat.
3. Provide a 100 foot non-disturbance natural vegetative buffer easement along the entire east property line of Tract A.
4. Provide a 100 foot non-disturbance natural vegetative buffer easement along the north and southeast sides of Tract C and the east side of Tract B.
5. Correct drafting error to change Section 13 identification at the southwest corner of the plat boundary to Section 14 to the west of Tract B.
6. Resolve the need to provide pedestrian access easement(s) through the 100' foot non-disturbance natural vegetative buffer easement along the east property line of Tract A, to enable access to the high school from existing or future residential areas. The width and location of the pedestrian easements to be resolved with the Planning Department.

7. Submitting a grading and drainage plan to Project Management and Engineering to resolve the need for drainage easements and drainage improvements and to demonstrate that post development drainage will not adversely impact adjacent properties, adjacent rights of way or the existing drainage system in Eagle Pointe Subdivision prior to recording a final plat.
8. Submitting to Project Management and Engineering a comprehensive analysis of the current Eagle River High School site drainage problems and submission of revised plans for the existing Eagle River High School building permit to reflect a permanent solution.
9. Designing and installing temporary measures to mitigate further flooding of the Yosemite Drive right-of-way.
10. Performing a hydro-geological study to determine what impacts the proposed retention/infiltration basin for the Eagle River high school site will have on the bluff feature of Eagle Pointe Subdivision.
11. Entering into a development agreement for improvements of Yosemite drive from Eagle River Loop Road to Eagle Pointe Subdivision to the following standards:
 - a. A paved street cross-section 33 feet wide from back of curb to back of curb;
 - b. Two 11-foot travel lanes;
 - c. Two 3.5-foot paved shoulders;
 - d. Two 2-foot curbs and gutters; and
 - e. A 5-foot sidewalk and an 8-foot multi-use path separated 6.5 feet from the curb.
 - f. Street lighting, as required by AMC 21.85.030(A) along the length of Yosemite Drive.
 - g. "No parking" signs, as required by AMC 21.85.030(A), along the full length of Yosemite Drive, not just by the driveways to the school.
 - h. Channelization and signalization of the intersection of Yosemite Drive and Eagle River Loop Road.
12. Unless alternate funding for the road and drainage improvements is obtained by the Municipality of

Anchorage, the School District shall enter into a development agreement for the above-stated improvements before the final plat is recorded.

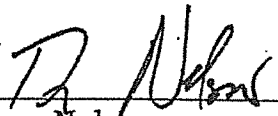
CONCLUSIONS:

The Platting Board took into consideration the written analyses of staff, testimony of the petitioner, and public comment, both written and oral that was presented at the April 6, 2005 public hearing. The Platting Board reviewed the preliminary plat in conformance with subdivision regulations, the Design Criteria Manual, the amended Official Streets and Highways Plan (OS&HP), *Anchorage 2020*, and the goals and objectives of the applicable elements of the Comprehensive Plan.

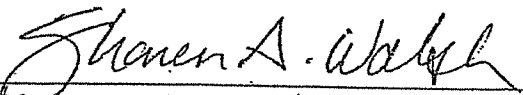
Based on the foregoing Findings and Conclusions, be it resolved by the Anchorage Municipal Platting Authority that the preliminary plat is found to generally conform to the subdivision regulations, zoning regulations, and meets the goals contained in AMC 21.75, and the 18-month time extension for the preliminary plat and vacation of a utility easement is amended and approved pursuant to the Anchorage Municipal Code.

NOW, THEREFORE, be it resolved by the Platting Authority that the Platting Board adopts the above stated findings and conclusions.

ADOPTED by the Platting Board this 1st day of June 2005.



Tom Nelson
Secretary



Sharen Walsh
Vice-Chair

Case S-11099-3

Case S-11099-4

**Eagle River Area High
School Subdivision**

Public Hearing Record of the
April 6, 2005 Platting Board Meeting
Record of the April 20, 2005, May 4, 2005
and June 1, 2005 Platting Board Meetings

Findings of Fact Adopted during the
June 1, 2005 Platting Board Meeting

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C

Supreme Court of Alaska.
 ANCHORAGE BOARD OF ADJUST-
 MENT and Anchorage School District,
 Appellants,
 v.
 LBJ, LLC, Appellee.

No. S-13337.
 April 2, 2010.

Appeal from the Superior Court of the
 State of Alaska, Third Judicial District,
 Anchorage, Fred Torrisi, Judge.

W. Michael Stephenson, David A.
 Nesbett, Jermain Dunnagan & Owens,
 P.C., Anchorage, for Appellant Anchor-
 age School District.

Robert A. Royce, Moira K. Smith, Ash-
 burn & Mason, P.C., Anchorage, for
 Appellee.

Before: CARPENETI, Chief Justice,
 WINFREE and CHRISTEN, Justices.

OPINION

PER CURIAM.

The Anchorage School District ap-
 peals the superior court's decision re-
 versing the Anchorage Board of Ad-
 justment's decision and reinstating that

of the Anchorage Platting Board. We
 AFFIRM the superior court's decision for
 the reasons expressed in that decision,
 which we attach as an appendix.

FABE, Justice, not participating.

APPENDIX
 IN THE SUPERIOR COURT FOR THE
 STATE OF ALASKA
 THIRD JUDICIAL DISTRICT AT AN-
 CHORAGE
 LBJ, LLC

Appellant,

v.

ANCHORAGE BOARD OF AD-
 JUSTMENT and ANCHORAGE
 SCHOOL DISTRICT,

Appellees.

Case No. 3AN-06-4251 CI
 Planning Dept. Nos. S-11099-3 & 4
Decision on Appeal^{FN*}

FN* The superior court's Decision
 on Appeal has been edited to
 conform to our style and format-
 ting requirements and most in-
 ternal citations have been omit-
 ted.

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The Municipality of Anchorage built a new high school in Eagle River near the end of Yosemite Drive, a road leading to a subdivision being developed by Appellant LBJ. The Platting Board found that this required the school district to improve the road, but the Board of Adjustment reversed based on a Traffic Impact Analysis, which concluded that no major upgrades were required. The developer argues that the latter decision was not supported by substantial evidence, and that because the road was designated an urban collector, the improvements were required by the city code.^{FN1}

FN1. Anchorage Municipal Code (AMC) 21.85.030.

Summary of proceedings before Platting Board and Board of Adjustment

The Eagle Pointe Subdivision is some 93 acres, and has been under development since 1998. Partially occupied now, it will eventually have almost 300 residential units, and it is zoned R-1 SL. Access to Eagle River Loop Road and the Glenn Highway is via Yosemite Drive, which is 24 feet wide, paved, with gravel shoulders, except for the portion within the Eagle Pointe Subdivision, which was built to “urban collector standards,” meaning it is 33 feet wide, with paved shoulders, curbs, gutters and

streetlights. The road was built by LBJ at the beginning of its development.

In 2003, the Municipality obtained preliminary approval to subdivide and rezone a 50 acre tract on the Glenn Highway (SW) end of Yosemite Drive, for construction of a new high school, Eagle River High. The Anchorage Assembly approved the rezoning. The new designation was PLI, Public Lands and Institutions, within the urban improvement *88 area in LBJ's view,^{FN2} although ASD argues that the designation as “urban” did not take effect, if it ever did, until well after the 2003 preliminary plat was approved. The preliminary approval had not required specific improvements to Yosemite Drive, deferring instead to the recommendations of the Traffic Impact Analysis, but when the matter came back to the Platting Board in 2005, it found that upgrades were required, including sidewalks, a “critical” safety issue. The board also concluded that it was important that the school be allowed to open as scheduled. The Platting Board accordingly listed the improvements that would have to be made to the road, but gave the school district time to seek funding alternatives from the Municipality. The board noted that it was treating the application as it would for any other entity, and imposed standards equivalent to “urban collector standards,” which would require upgrades similar to those

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in place on the most eastern portion of the road—curbs, gutters, lighting, paved shoulders and a separated multi-use path.^{FN3}

FN2. See AMC 21.85.020(E).

FN3. See AMC 21.85.030(A).

The school district appealed to the Board of Adjustment. The BOA determined that the Platting Board's decision was not supported by substantial evidence, substituted its own judgment, and concluded that Yosemite Drive did not need to be upgraded to urban collector standards. It instead reinstated the earlier Platting Board condition requiring negotiation of a "subdivision agreement with the Private Development Section for construction of any road improvements that may be required by the final approved Traffic Impact Analysis." It also concluded that the finding that the lack of a sidewalk was a critical life safety issue was not supported by substantial evidence. It declined to address whether the Platting Board exceeded its authority in requiring specific design standards, whether the designation of an urban residential area was correct, whether the school district was a subdivider as that term is used in AMC 21.75.035, and whether the district could be required to enter into a subdivision agreement. (It found that ASD had already agreed to

enter into the subdivision agreement to implement the recommendations of the Traffic Impact Analysis.) The TIA had concluded that the road could accommodate a school of 800 students without the upgrades required by the Platting Board. This appeal followed.^{FN4}

FN4. AMC 21.30.180; AS 22.10.020(d); Alaska R.App. P. 601(a).

Standard of Review

This appeal is on the municipal record, and the findings are to be sustained if, in light of the entire record, they are supported by substantial evidence.^{FN5} I am to view the evidence in favor of the findings, without reweighing and substituting my judgment.^{FN6} Moreover, a presumption of validity is to be accorded zoning decisions.^{FN7} The adequacy of findings and conclusions, however, does present a legal issue which is reviewed *de novo*,^{FN8} as are other such issues not involving agency expertise,^{FN9} or which present only a question of statutory interpretation.^{FN10} Questions that do involve agency expertise are reviewed to determine if they have a reasonable basis.^{FN11}

FN5. *S. Anchorage Concerned Coal., Inc. v. Coffey*, 862 P.2d 168, 173 (Alaska 1993); AS 29.40.060; AMC 21.30.180(A),

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190.

FN6. *Raad v. State Comm'n for Human Rights*, 86 P.3d 899, 903 (Alaska 2004).

FN7. *S. Anchorage Concerned Coal.*, 862 P.2d at 173 (citing 3 EDWARD ZIEGLER, RATHKOPH'S THE LAW OF ZONING AND PLANNING, § 42.07 at 42–65 (1992)).

FN8. *Raad*, 86 P.3d at 904; *Alvarez v. Ketchikan Gateway Borough*, 28 P.3d 935, 938 (Alaska 2001).

FN9. *Holding v. Municipality of Anchorage*, 63 P.3d 248, 250 (Alaska 2003).

FN10. *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903–904 (Alaska 1987).

FN11. *Id.* at 903.

ASD disagrees with Appellant's statement that I should view the BOA decision just as the supreme court views one of the superior court sitting as an intermediate appellate court, and to the extent this standard conflicts with that stated above, the school district*89 is correct; deference is afforded to the

board's interpretation within its proper sphere.^{FN12} But there may also be a question of how to interpret an ordinance that says that the findings of “the platting board ... and the board of adjustment shall not be reversed if, in light of the whole record, they are supported by substantial evidence,”^{FN13} if the two bodies came down on opposite sides on an important factual issue. Given the deferential standard,^{FN14} it is conceivable that *both* decisions could be supported by substantial evidence.^{FN15} While courts try to be consistent in applying the standard of review, it is not always a completely straightforward exercise.^{FN16}

FN12. *S. Anchorage Concerned Coal.*, 862 P.2d at 173 n. 12; *Vill. of Eklutna v. Bd. of Adjustment*, 995 P.2d 641, 643 (Alaska 2000).

FN13. AMC 21.30.190.

FN14. See *Ketchikan Gateway Borough v. Ketchikan Indian Corp.*, 75 P.3d 1042, 1045 (Alaska 2003).

FN15. See AMC 21.30.095 (Board of Adjustment decisions on appeal).

FN16. See *generally Galt v. Stanton*, 591 P.2d 960, 966–67 (Alaska 1979) (Rabinowitz, J.,

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concurring).

Statement of facts and the positions of the parties

The school district emphasizes the chronology of the proceedings below, noting the long period of time that elapsed between the preliminary commitment and the hearing at which local residents turned out at the bidding of LBJ and steamrolled the platting board into requiring improvements to Yosemite Drive. It points out that LBJ principal Jose Vincente did not originally ask for upgrades to urban collector standards, and that the preliminary plat was approved without objection. The road was not designated as a "collector" street until September of 2003, and the TIA completed in early 2004 concluded that it was adequate for the projected traffic. Mr. Vincente's appeal of this decision was rejected as untimely, apparently because condition G of the preliminary approval required submission of the traffic analysis. But when approval of the final application dragged on, Mr. Vincente was able to reopen the public hearing to address issues relating to Yosemite Drive, based on new evidence or changed circumstances. The Platting Board was informed that the MOA was seeking state funding of a project to upgrade the road to urban collector standards, although staff recommended against requiring ASD to require this.

At the March 8, 2005 Assembly meeting, Mr. Vincente testified that ASD's construction of a new school was subject to title 21 of the municipal code, and improvements to Yosemite Drive were needed. The school district agreed that it was bound by title 21, but noted that the municipality builds roads and ASD doesn't. The major road issue discussed at this meeting and the subsequent school board meeting concerned drainage, and the Assembly deferred to the Platting Board.

By letter of March 31, 2005, LBJ noted that it was now time for the Platting Board to determine the most compatible improvement area under AMC 21.85.020(E). The letter urged that the designation be "urban," and argued, as Appellant does in this appeal, that this meant that the road would have to be upgraded by the district to the urban standards set forth in AMC 21.85.030(A), which does indeed list curbs and gutters, sidewalks, walkways and street lighting.^{FN17} At the public hearing in April, the Platting Board heard from both sides on this issue, and approved a motion that Yosemite Drive be improved to collector status. While it was originally contemplated that this would happen before the new school opened in the fall, "calmer heads prevailed" and the requirement was delayed, as reflected by the June 1

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decision of the Platting Board.

FN17. AMC 21.85.030(A)(3)-(6).

Since LBJ's position is that the urban classification means that the road upgrades are required by the ordinance, the district argues that the Platting Board never did find that the school site should be placed in an urban improvement area. It also argues that the BOA decision is supported by substantial evidence, and that if upgrades are necessary, *90 the Municipality is responsible for them. ASD also maintained in both its briefing and at oral argument that, for a variety of reasons, setting aside the BOA decision and reinstating the Platting Board's would be unfair. Each of these issues will be addressed in turn.

Did the Platting Board place the new school in an urban improvement area?

LBJ starts from the premise that the Platting Board placed the school subdivision in an urban improvement area. It quotes the head of MOA's planning director that "upon adoption of the PLI zone by the Assembly, the property will be subject to urban development standards." The full quotation is set forth in the opening brief, and the Platting Board adopted a resolution a month later that said basically the same thing: Yosemite Drive was designated a collector street in

2003, and if rezoned to PLI, the effect would be to "subject the property to urban rather than rural road improvement development standards under AMC 21.85.020." A month later, the Assembly did just that, and that change was duly noted by the Platting Board in its discussion before adoption of its decision on June 1.

But ASD still contends that the board "failed to make the necessary finding that the school site should be placed in an 'urban improvement area.'" It points to the April 20, 2005 meeting in which the board did not act on a specific request for such a finding, and to the vote on an amendment to use the words "urban collector standards" in Condition 11. It also notes that much of Tract A is undeveloped and could reasonably be designated rural.

The ordinances, however, require the Platting Board to "place a subdivision within the PLI zoning district in the improvement area that it finds to be most compatible with the proposed use of the parcel and the zoning district classifications of the surrounding area."^{FN18} The Eagle Pointe Subdivision, east of the school and parcel A in the site plan, is zoned R-1, which is by ordinance an automatically urban designation, and parcels C and D, west and northwest, are I-2 (industrial), also urban.^{FN19} Eagle

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River Loop road, which intersects Yosemite and connects it with the highway, is also zoned residential. The Mental Health Trust owns parcel B, zoned PLI, which is also the case with the lands to the north and west of the area. There is a greenbelt to the northeast.

FN18. AMC 21.85.020(E).

FN19. AMC 21.85.020(A).

In addition to arguing that the urban designation is the most compatible with the area, LBJ notes that the district argued to the Board of Adjustment that the Platting Board took that action, and that the BOA characterized the issue raised in the appeal as whether the board “erred in determining that the Eagle River High School site should be designated urban under AMC 21.85.020.” While it ultimately concluded that it did not need to resolve this issue, Appellant is correct that this is the only way to read the administrative record. The Platting Board placed the school site in an urban improvement area, and then, even while declining to directly apply the ordinance, imposed requirements equivalent to those found in AMC 21.85.030(A).

How should the two decisions on urban collector standards be analyzed?

Neither the Platting Board nor the BOA expressly decided whether the ur-

ban designation meant that Yosemite Drive had to be upgraded to urban collector standards, with the former board mandating equivalent improvements, and the latter determining that the decision to require the upgrades was not supported by substantial evidence. The Board of Adjustment then concluded that it did not need to decide whether the Platting Board exceeded its authority in requiring the improvements. LBJ argues that not only did the Platting Board have the power to impose urban collector standards, but that both it and the BOA were required to do so by AMC 21.85.030(A).

The platting authority may only approve plats that conform to chapters 21.75 through *91 .85 of the municipal code,^{FN20} and 21.85.030 provides that the subdivider “shall construct and install the improvements provided by this section for the improvement area where the subdivision is located.” Subsection A of this ordinance lists those items required for the urban areas, and they are basically the same improvements required by the Platting Board. The Board finessed the question of whether the standards applied directly, worrying about precedent, and then the district argued on appeal that specific design standards proposed by the developer couldn't be imposed upon it in this way. But it is difficult to understand exactly how the

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standards might have been thought *not* to apply, given the understanding that ASD would be treated as any other subdivider ^{FN21} and the straightforward language of the municipal ordinances.

FN20. AMC 21.75.010(A)(1).

FN21. AMC 21.75.035.

ASD essentially argues that such a result would not be fair—all that was originally sought was an improvement to the road's shoulders, the preliminary plat did not contain the requirements, and Yosemite Drive wasn't designated a collector street until after approval of the preliminary plat. The TIA concluded that the road was adequate. The Chugiak Birchwood Eagle River Rural Road Service Area has the authority to upgrade the road. Historically, MOA and not the district has funded such improvements. Money has been requested from the Legislature. These latter contentions will be addressed next, followed by an attempt to apply the standard of review to the conflicting decisions of the two boards that considered the issue, and then a brief discussion of fairness and procedural due process.

Is the Municipality rather than ASD responsible for the upgrades?

The Board of Adjustment concluded that the Chugiak Birchwood Eagle River

Rural Road Service Area (CBERRRSA) had the authority but not the responsibility to fund and construct improvements to Yosemite Drive. Without providing any authority to demonstrate that the board erred in this regard, ASD argues that the record is absolutely clear that the Municipality and not it has historically funded and constructed road improvements adjacent to schools, and that CBERRRSA is the responsible service area. It further notes that if MOA requested a grant from the Legislature to pay for the improvements, that using state money would trigger federal funding. It accuses LBJ and residents of the Eagle Pointe Subdivision of “clamoring for immediate improvements” to improve their own situation at public expense.

As was observed above, ASD has not argued that it should be treated differently than any other subdivider. It is therefore incumbent upon it to provide the analysis and authority for its position. While it provides the germ of an argument with its contention that it shouldn't have to provide improvements for the entire length of Yosemite Drive, it fails to develop this, or to show how the history and politics involved advance its position under the applicable ordinances. LBJ built the road to the required standard within its subdivision, and the district is essentially being held to the same standard, albeit to a longer stretch of the

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road and in a context that evolved over time.

Nor is the relationship between ASD and the Municipality raised in this appeal. This is a complex subject, which has a number of checks and balances,^{FN22} and which has been addressed to some extent by Alaska law.^{FN23} A conclusion that ASD is responsible for the upgrades in no way precludes city or even state funding of the project. But absent some answer to the seemingly universal requirements of the Code,^{FN24} the District's argument that the CBERRRSA is directly responsible for the upgrades must fail.

FN22. *Homeward Bound, Inc. v. Anchorage School Dist.*, 791 P.2d 610, 612 (Alaska 1990).

FN23. AS 14.14.060–065.

FN24. AMC 21.85.010.

***92 What does the substantial evidence test mean in this context?**

As noted earlier, this court's review of factual determinations does not allow for re-weighing of the evidence; a finding is to be sustained if supported by substantial evidence.^{FN25} But AMC 21.30.190 gives this deferential standard to both boards, and they arrived at different conclusions as to whether Yosemite Drive had to be upgraded to urban col-

lector standards. Specifically, the Board of Adjustment found that the Platting Board's decision requiring the upgrade of Yosemite Drive to urban collector standards was not supported by substantial evidence. It then substituted its judgment and reinstated the condition that only required compliance with the recommendations of the Traffic Impact Analysis.

FN25. See note 5, above.

Consistent with this conclusion, the school district argues that the TIA provided a valid basis for the BOA decision. LBJ responds to this by pointing out flaws in the analysis, and there is ample material in the record from which to support either conclusion. The BOA did not discuss the evidence in its decision, citing only to the TIA, and disagreeing with the conclusion that the increased traffic volume and safety concerns constituted substantial evidence for the decision of the Platting Board. The BOA also cited testimony that there was already a trail from the subdivision to the school, and concluded that the finding that the absence of a sidewalk posed a critical life safety issue was not supported by substantial evidence. LBJ contends that there was indeed substantial evidence that the street is too narrow and too dark for winter use by pedestrians, especially students.

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But despite the briefing and argument, it still isn't apparent how the Board of Adjustment reached its decision, or that there is a genuine issue of material fact raised by this appeal. The first predicate fact to the Platting Board's decision was that Yosemite Drive was a collector road. The BOA never disagreed with this finding, which seems wholly in line with the term's definition.^{FN26} Next, the Platting Board found that the subdivision had been rezoned PLI by the Assembly, and the BOA likewise did not disagree with this finding. When a subdivision is rezoned PLI, the Platting Board must place it within the improvement area that it finds to be most compatible with the proposed use of the subdivision and zoning of the surrounding area.^{FN27} Having reached this point, the Platting Board was required to decide which improvement area under AMC 21.85.020 was most appropriate for the new Eagle River High School Subdivision, as was discussed earlier. ASD has simply never explained how it is that the BOA could leave this analysis essentially unchanged, and yet conclude that urban collector standards don't apply to this particular stretch of road. Accordingly, the issue posed is a legal one, and ASD has failed to supply a reasonable basis for the decision made by the Board of Adjustment. And, while the finding of the Platting Board that the improvements are

justified by safety concerns might be sustained as supported by substantial evidence, it is not necessary to reach this issue, since I conclude that if Yosemite Drive is an urban collector street, the ordinance requires the improvements by operation of law.

FN26. AMC 21.35.020.

FN27. AMC 21.85.020(E).

Was ASD denied due process or treated unfairly?

As noted earlier, the school district devoted substantial portions of its memorandum and oral argument to the chronology of the proceedings below and the reasons why reversal of the BOA decision would be unfair to it and the citizens of Anchorage. Yosemite Drive was not designated a collector street at the outset, and the preliminary plat did not require the upgrades that were later deemed necessary. ASD maintains that this didn't allow it to budget for the improvements and obtain the necessary appropriation.

One might imagine that private developers would make a similar pitch, when unanticipated environmental or other costs raise the price, and the first question would be whether^{*93} the improvements are actually required. That will often be a factual issue, and if the

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developer was denied an opportunity to fully present evidence or was otherwise disadvantaged in the proceedings, a remand might be necessary to assure a fair process. But if the law is unambiguous and doesn't turn on a factual dispute, the fact that the cost may have been unforeseen will not give rise to any remedy on appeal. Nor does the district's perfunctory invocation of due process help its cause, since—even if treated as a party entitled to constitutional protection—it fails to point to a failure of notice or opportunity to be heard, but rather asks for a result that appears to be contrary to what is required by the Municipal Code. By definition, the process contemplates that changes might be made to a preliminary plat. While the district may feel snookered by the unique chronology and late-breaking politics, the result should have been predictable as far back as September of 2003, when the transportation plan was amended to designate Yosemite Drive a collector, and I find no unfairness to the district.

Conclusion

The district has agreed from the outset that it was subject to title 21 of the Municipal Code. While it is true that significant effort in the administrative proceedings was devoted to issues of traffic and safety, and that the Platting Board did not directly rule that Yosemite Drive was an urban collector, it does appear

that there is no other way to read the record. Accordingly, the issue presented in this appeal is more narrow—must a subdivider upgrade a road to the standards set forth in AMC 21.85.030(A) when, prior to approval of a final plat, the road is found to be a collector road in an urban improvement area? I conclude that the answer is yes. While a traffic study might be used to require improvements to a road not designated an urban collector, it cannot be used to dispense with those required by the Code, at least not without going through the variance procedure. Accordingly, the decision of the Board of Adjustment is reversed and that of the Platting Board reinstated.

Dated: October 15, 2008

/s/ Fred Torrisi

Superior Court Judge

Alaska, 2010.

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END OF DOCUMENT

RETURN TO: Anchorage School District
Attn.: Edie Knapp P.E.
1301 Labar Street
Anchorage, AK 99515

Anchorage Recording District

YOSEMITE DRIVE UPGRADE and YOSEMITE DRIVE AREA DRAINAGE IMPROVEMENTS
DEVELOPMENT AGREEMENT

ASD Project No: 865007 Yosemite Dr Upgrade
PM&E Project No: 07-54 Yosemite Dr Drainage Improvements

This will constitute a Development Agreement (DA) made and entered into this 22nd day of MARCH, 2013, by and between THE ANCHORAGE SCHOOL DISTRICT (hereinafter ASD) and THE MUNICIPALITY OF ANCHORAGE (MOA) Project Management and Engineering Division (hereinafter PM&E), regarding the work identified as Yosemite Drive Upgrade (ASD Project No 865007) and Yosemite Drive Area Drainage Improvements (PM&E Project No 07-54).

GEORGE J. VAKALIS executes this DA on behalf of the PM&E in the capacity of Municipal Manager. MICHAEL ABBOTT executes this DA on behalf of the ASD in the capacity of Chief Operating Officer. The parties to this DA shall accept notices at the following addresses and telephone numbers:

PM&E
Municipality of Anchorage
Department of Public Works
P.O. Box 196650
Anchorage, AK 99519
FAX: (907) 343-8088

ASD
Anchorage School District
1301 Labar Street
Anchorage, AK 99515
FAX: (907) 348-5227

The Project is located within the Anchorage Recording District as certificated by the Regulatory Commission of Alaska. See the attached map for approximate location of Projects.

Section 1 The Projects.

- A. Per the Platting Board decision formalized at the March 7, 2012 Platting Board meeting, ASD shall upgrade Yosemite Drive from Eagle River Loop Road to Yellowstone Drive to MOA urban collector standards, as follows:
1. A paved street cross-section 33 feet wide from back of curb to back of curb;
 2. Two 11-foot travel lanes;
 3. Two 3.5-foot paved shoulders;
 4. Two 2-foot curbs and gutters;
 5. A 5-foot sidewalk and an 8-foot multi-use pathway separated 6.5 feet from the curb;
 6. Street lighting, as required by AMC 21.85.030(A) along the length of Yosemite Drive;
 7. "No Parking" signs, as required by AMC 21.85.030(A), along the full length of Yosemite Drive, not just by the driveways to the school;
 8. Channelization and signalization of the intersection of Yosemite Drive and Eagle River Loop Road.

Other anticipated improvements include a piped storm drain system and landscaping. ASD has requested a State grant to provide funding for these improvements.

- B. The PM&E Yosemite Drive Area Drainage Improvements project is presently in the preliminary design phase. PM&E shall construct a piped storm system to collect and route runoff from Yosemite Drive, Eagle River High School and the Eagle Pointe Subdivision to a proposed infiltration gallery within the Heritage Land Bank (HLB) land to the north. The project will also provide a drainage facility to route flood level runoff directly to Eagle River through Chugach State Park. The Design Study Report for this project was completed in 2011 and survey and geotechnical work is proceeding.

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Development Agreement
Yosemite Drive Upgrade- ASD Project No 865007
Yosemite Drive Area Drainage
Improvements- PM&E Project No 07-54

Additional funding is necessary to complete the design and construction of the project. PM&E currently has a State grant request in for the funding to complete the project.

C. The intent of this agreement is to provide that:

1. PM&E shall manage both of the subject projects in their entirety. PM&E shall coordinate as necessary to ensure that all Conditions of Approval set forth by the Platting Board for the Yosemite Drive Upgrade are met or otherwise resolved.
2. ASD shall provide full funding for the Yosemite Drive Upgrade project and such funds will be made available to PM&E to facilitate the project. It is expressly understood that ASD shall provide funds to finance the actual cost associated with all work performed for the Yosemite Drive Upgrade project including, but not limited to, agreement administration, coordination, solicitation, project management, surveying, engineering, permitting, plan checking, construction, construction administration, utility coordination, right-of-way coordination, field surveillance, testing, final inspections, warranty inspections, and overhead.
3. PM&E shall continue to provide all funding necessary to complete the Yosemite Drive Area Drainage project.

It is anticipated that the drainage system installed as part of the Yosemite Drive Upgrade project will connect to the drainage system installed as part of the Yosemite Drive Area Drainage Improvements. The Yosemite Drive Area Drainage Improvements will need to be completed prior to commencement of construction of the Yosemite Drive Upgrade. See attached map for delineation of the projects.

Section 2 Estimated Project Cost.

The Estimated Costs as itemized below are based on the estimates provided by ASD, PM&E or their agents. These costs are preliminary and the parties shall be responsible for providing any and all funds necessary to complete the respective projects.

A. ASD's Estimated Yosemite Drive Upgrade Project Cost:

Estimated construction cost:	\$ 6,700,000
Estimated design, management and all other related costs (i.e. consultant fees, soils, survey, construction/project administration, inspection, coordination, warranty etc.):	\$ 3,580,000
TOTAL ESTIMATED COST:	\$ 10,280,000

B. PM&E's Estimated Yosemite Drive Area Drainage Project Cost:

Estimated construction cost:	\$ 3,750,000
Estimated design, management and all other related costs (i.e. consultant fees, soils, survey, construction/project administration, inspection, coordination, warranty etc.):	\$ 3,250,000
TOTAL ESTIMATED COST:	\$ 7,000,000

Development Agreement
Yosemite Drive Upgrade- ASD Project No 865007
Yosemite Drive Area Drainage
Improvements- PM&E Project No 07-54

ARTICLE I

GENERAL PROVISIONS

1.01 Application of Article.

Unless this DA expressly provides otherwise, all provisions of this Article apply to every part of this document.

1.02 Permits, Laws, and Taxes.

PM&E shall acquire and maintain in good standing all permits, licenses and other entitlements necessary to its performance under this DA. All actions taken by PM&E under this DA shall comply with all applicable statutes, ordinances, rules, and regulations.

1.03 Non-Waiver.

The failure of the parties at any time to enforce a provision of this DA shall in no way constitute a waiver of the provision, nor in any way affect the validity of the DA or any part hereof, or the right of the parties thereafter to enforce each and every provision hereof.

1.04 Effect of Standard.

The MOA Standard Specifications (M.A.S.S.) and the PM&E Design Criteria Manual in effect at the time this DA is executed, as well as Titles 21 and 24 of the Anchorage Municipal Code, shall be the minimum standards for performance under this DA unless otherwise specifically provided in writing. Definitions or other provisions in the standard specifications describing the relationships and responsibilities of parties to Municipal construction contracts do not apply herein to the extent that they conflict with any provision of this DA.

1.05 Amendment.

The parties may amend this DA only by mutual written agreement, which shall be attached hereto.

ARTICLE II

PREREQUISITES TO CONSTRUCTION

PM&E shall manage the work and shall not obtain permits for construction of the improvements or commence construction until the requirements of Paragraphs 2.01 through 2.02 below have been met.

2.01 Engineer.

PM&E shall retain an Engineer registered as a Professional Engineer under the laws of the State of Alaska to design the improvements, including preparing the plans and specifications. PM&E shall oversee the design and construction.

2.02 Surveyor.

All surveys required for the completion of improvements under this DA shall be made by a person registered as a Professional Land Surveyor under the laws of the State of Alaska.

ARTICLE III

ACCEPTANCE OF IMPROVEMENTS

3.01 Prerequisites to Acceptance.

The ASD and PM&E shall jointly inspect the Yosemite Drive Upgrade improvements and issue a Certificate of Completion, as outlined in Division 10, Section 10.07, Article 7.7 of M.A.S.S.

Development Agreement
Yosemite Drive Upgrade- ASD Project No 865007
Yosemite Drive Area Drainage
Improvements- PM&E Project No 07-54

IN WITNESS WHEREOF, the parties hereto have set their hands on the date first set forth above.

ASD:

By: [Signature]

MICHAEL ABBOTT
Chief Operating Officer
Anchorage School District

PM&E

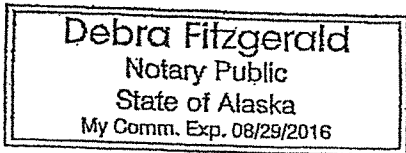
By: [Signature]

GEORGE J. VAKALIS
Municipal Manager
Municipality of Anchorage

STATE OF ALASKA)
)ss:
THIRD JUDICIAL DISTRICT)

THIS IS TO CERTIFY that on this 22nd day of March, 2013, before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned and sworn as such, personally appeared GEORGE J. VAKALIS, known to me to be the Municipal Manager named in the foregoing instrument, and he acknowledged to me that he had in his official capacity aforesaid executed the foregoing instrument as the free act and deed of the said corporation for the uses and purposes therein stated.

WITNESS my hand and official seal on the day and year first above written.

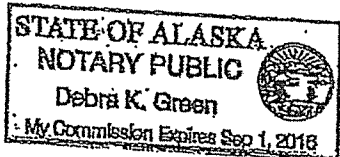


[Signature]
Notary Public in and for Alaska
My Commission Expires: 8/29/2016

STATE OF ALASKA)
)ss:
THIRD JUDICIAL DISTRICT)

THIS IS TO CERTIFY that on the 12 day of March, 2013, before me, the undersigned, a Notary Public in and for the State of Alaska, duly sworn and commissioned as such, personally appeared MICHAEL ABBOTT, known to me to be the Chief Operating Officer of the Anchorage School District named in the foregoing instrument, and he acknowledged to me that he had in his official capacity aforesaid executed the foregoing instrument as the free act and deed of the said corporation for the uses and purposes therein stated.

WITNESS my hand and official seal the day and year in this certificate first above written.



[Signature]
Notary Public in and for Alaska
My Commission Expires: Sept. 1, 2016